

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Alan Weinblatt,

Complainant,

vs.

**FINDINGS OF FACT,
CONCLUSIONS, AND ORDER**

Patrice Bataglia,

Respondent.

The above-entitled matter came on for an evidentiary hearing on November 5, 2004, before a panel of three Administrative Law Judges: Steve M. Mihalchick, (Presiding Judge), John A. Ellefson,^[u] and Richard C. Luis. The hearing record closed upon adjournment of the hearing that day.

Complainant Alan W. Weinblatt, Attorney at Law, Weinblatt & Gaylord, P.L.C., 111 East Kellogg Boulevard, Suite 300, St. Paul, Minnesota 55101, appeared on his own behalf. William F. Mohrman, Attorney at Law, Mohrman & Kaardal, P.A., 33 South Sixth Street, Suite 4100, Minneapolis, Minnesota 55402, appeared on behalf of Respondent Patrice Bataglia.

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF THE ISSUES

1. Whether Respondent violated Minn. Stat. § 211B.06 by knowingly or with reckless disregard of the truth preparing and disseminating campaign material that was false with respect to certain acts of Fourth Congressional District candidate Betty McCollum.

The Administrative Law Judges find that she did on one of the two occasions alleged.

2. What sanction, if any, is appropriate?

The Administrative Law Judges conclude that a civil penalty of \$700 should be imposed.

Based upon the record and the proceedings herein, the Administrative Law Judges make the following:

FINDINGS OF FACT

Background

1. Respondent was the Republican candidate running against incumbent Democratic Congresswoman Betty McCollum in Minnesota's Fourth Congressional District this year. Rep. McCollum won the election with 58 percent of the vote, to Respondent's 33 percent, to Independent Peter Vento's 9 percent.^[2]

2. The mailing that is the subject of the Complaint is a piece of campaign literature concerning Rep. McCollum that Complainant received by mail at his home in the Fourth Congressional District on October 21, 2004.^[3] It is a two-sided flyer that was mailed by Respondent's staff to many of households in the District. The disclaimer on the flyer states that it was paid for by Bataglia for Congress. That is Respondent's campaign committee. Respondent testified that she is responsible for her committee's actions, including the flyer.

3. The front of the flyer asks, **"Where does Betty McCollum stand on supporting our military and protecting our country? Take a look at her voting record..."** The front side also has space for the mailing information. The back side of the flyer states:

Even after 9-11 Betty McCollum has consistently opposed supporting our troops and protecting our country from terrorists...

October 2002 Voted against authorizing the use of force in Iraq.
(H.J. Res 114)

November 2002 Voted against creating the Department of Homeland Security. (H.R. 5710)

March 2003 Voted against commending the troops for liberating Iraq (H.R. 561)

April 2003 Voted against approval of Emergency Wartime Supplemental Appropriations Act. (H.R. 172)

October 2003 Voted against the Emergency Supplemental Appropriations Act that would have given \$87 Billion to support our troops in Afghanistan and Iraq. (H.R. 3289)

Our Military and our country deserve better.

On November 2nd, Vote for Patrice Bataglia!

4. In the parlance of the U.S. House of Representatives, pieces of proposed legislation, “bills,” are denominated as “H.R.” followed by a number. Simple House resolutions dealing with procedures or operations are denominated as “H.Res.” followed by a number.^[4]

The March 2003 Entry—Commending the Troops

5. The March 2003 entry is false. Rep. McCollum did not vote against commending the troops for liberating Iraq in March 2003. In addition, H.R. 561 referred to in the flyer was a mistaken reference to a totally unrelated bill.^[5]

6. Contrary to the statement in the flyer, on March 21, 2003, Rep. McCollum voted in favor of House Concurrent Resolution 104, “Expressing the support and appreciation of the Nation for the President and members of the Armed Forces who are participating in Operation Iraqi Freedom.”^[6] On March 20, 2003, Rep. McCollum had spoken in favor of the resolution and in support of the troops and President on the House floor.^[7]

7. Respondent and her committee based the statement that Rep. McCollum voted against commending the troops on her March 17, 2004, votes on H.Res. 561. The references to March 2003 and H.R. 561 were unintentional mistakes.^[8]

8. H.Res. 561 was a procedural resolution to bring H.Res. 557 up for a vote. In turn, H.Res. 557, by its short title/description, was a resolution “Relating to the liberation of the Iraqi people and the valiant service of the United States Armed Forces and Coalition forces.” On March 17, 2004, Rep. McCollum twice voted against H.Res. 561 and then, later that day, against H.Res. 557.^[9]

9. It was not unreasonable for Respondent and her committee to interpret Rep. McCollum’s vote against H.Res. 557 on March 17, 2004, as being against commending the troops for liberating Iraq because of its short title.

10. The March 2003 statement in the flyer was not made by Respondent with knowledge that it was false or with reckless disregard of whether it was false.

The April 2003 Entry—Emergency Wartime Supplemental Appropriations Act

11. The April 2003 entry is false. Rep. McCollum did not vote against the Emergency Wartime Supplemental Appropriations Act in April 2003. In addition, H.R. 172 referred to in the flyer was a mistaken reference to a totally unrelated bill.^[10]

12. Contrary to the statement in the flyer, Rep. McCollum did, in fact, vote for the Emergency Wartime Supplemental Appropriations Act, H.R. 1559, on April 3, 2003.^[11]

13. Respondent and her committee based the statement that Rep. McCollum voted against the Emergency Wartime Supplemental Appropriations Act on her April 3, 2003, vote on H.Res. 172. The reference to H.R. 172 was an unintentional mistake.^[12]

14. H.Res. 172 was a procedural resolution to bring H.R. 1559, the Emergency Wartime Supplemental Appropriations Act, up for a vote. On April 3, 2003, at 11:37 a.m., in Roll Call vote 103, the House voted “on ordering the previous question,” in other words, to close debate on H.Res. 172. All Republicans voted in favor of closing debate; all Democrats, including Rep. McCollum, voted against the motion. The motion prevailed and at 11:42 a.m., the House passed H.Res. 172 by a voice vote.^[13] At 10:57 p.m. H.R. 1559, the Emergency Wartime Supplemental Appropriations Act itself passed the House by a 414 to 12 vote, with Rep. McCollum voting in favor of the bill.^[14]

15. Respondent and her committee included the statement that Rep. McCollum voted against the Emergency Wartime Supplemental Appropriations Act because Respondent believed that by voting against closing debate, Rep. McCollum had attempted to “kill” the bill before it reached the floor. Respondent decided that she could represent that vote to the public as voting against the Act, despite the fact that Respondent knew Rep. McCollum had actually voted for the Act.^[15]

16. The statement in the flyer that Rep. McCollum voted against the Emergency Wartime Supplemental Appropriations Act in April 2003 was made by Respondent with knowledge that it was false or with reckless disregard of whether it was false.

17. In mid-October, Respondent became aware that Rep. McCollum’s website was claiming that Respondent’s flyer contained the false statements complained of in this matter. In response, on October 22, 2004, Respondent had her website modified to state that Rep. McCollum “voted to kill the Emergency Wartime Supplemental Appropriations bill in its tracks, before it could reach a final referendum” and cited H.Res. 172 for that assertion. Respondent also acknowledged on her website that a “printing error” showed that the vote on H.R. 561 had occurred in March of 2003, but had actually occurred in March of 2004.^[16]

Procedural Events

18. On October 25, 2004, Complainant filed a Complaint under Minn. Stat. § 211B.32, alleging that the March 2003 and April 2003 statements in the flyer violated Minn. Stat. § 211B.06, subd. 1. On October 25, 2004, Administrative Law Judge Barbara L. Neilson issued an Order finding that the Complaint stated two prima facie violations. On October 28 and 29, 2004, Judge Neilson held a probable cause hearing on the allegations in the Complaint. Both parties participated by telephone.

19. By Order issued November 1, 2004, Judge Neilson found probable cause to believe that Respondent violated Minn. Stat. § 211B.06, subd. 1, by making false

statements in campaign material that she knew were false or with reckless disregard of whether they were false.

20. On November 2, 2004, the Chief Administrative Law Judge assigned this matter to the undersigned panel of three Administrative Law Judges for evidentiary hearing pursuant to Minn. Stat. § 211B.35.

21. The Administrative Law Judges adopt as Findings any Conclusions that are more appropriately described as Findings.

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.01, subd. 2, amended in 2004, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”^[17]

3. The flyer at issue in this matter is campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

4. Minn. Stat. § 211B.06, subd. 1, provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

5. In this proceeding, a violation of Minn. Stat. § 211B.06, subd. 1, must be proved by clear and convincing evidence.^[18]

6. There is not clear and convincing evidence that Respondent made the statement that Rep. McCollum voted in March 2003 against commending the troops for liberating Iraq knowing it to be false or communicating it with reckless disregard of whether it was false.

7. There is clear and convincing evidence that Respondent made the statement that Rep. McCollum voted in April 2003 against approval of Emergency Wartime Supplemental Appropriations Act knowing it to be false or communicating it with reckless disregard of whether it was false. In doing so, Respondent violated Minn. Stat. § 211B.06, subd. 1.

8. Minn. Stat. § 211B.35, subd. 2, requires the Administrative Law Judges to make at least one of several dispositions. The Administrative Law Judges may dismiss the complaint, may issue a reprimand, may find a violation of Section 211B.06, may impose a civil penalty of up to \$5,000 for any violation of Chapter 211A or 211B, and may refer the complaint to the appropriate county attorney for criminal prosecution.

9. In this case, the Administrative Law Judges find that a statement made in campaign material did violate Chapter 211B.06. In determining the penalty, the Administrative Law Judges consider the gravity of the violation in terms of impact on voters, number of voters affected, ability to counter, and effect upon the voting process. Willfulness of the violation involves factors such as degree of intention, inadvertence, number of violations, history of violations, clarity of campaign statute, acceptance of responsibility, and corrective actions. The gravity of the violation in this case is low to moderate because it would likely impact the views of several, but not a great many voters. Many voters realize that voting record claims are usually distorted and difficult to assess without further explanation. Moreover, Rep. McCollum had at least a limited opportunity to respond to the statement and did so. The willfulness of the violation is moderate to high. Respondent knew that Rep. McCollum had voted for the Emergency Wartime Supplemental Appropriations Act, but said just the opposite in the flyer. This was deliberate and knowing. It is clear by her correction to her website that she knew what the truthful version of the facts was. But it was, based upon the record, an isolated act. Moreover, Respondent made some effort to verify the statement before she made it, although she ended up merely rationalizing it. Considering these factors, a penalty of \$700 is appropriate.

10. Respondent argues that Minn. Stat. §§ 211B.06 and 211B.32-211B.36 are unconstitutional in several regards. Administrative Law Judges lack authority to declare a statute unconstitutional on its face and no determination is made on the argument. In applying Minn. Stat. § 211B.06, the Administrative Law Judges are mindful that the predecessor statute was declared to be unconstitutionally overbroad in *State v. Jude*, 554 N.W.2d 750, 753-754 (Minn. Ct. App., 1996), because it did not meet the "actual malice test" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not—of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). For that reason, the actual malice test is now incorporated in the current version of Minn. Stat. § 211B.06 and has been applied here.

Based on foregoing Findings and Conclusions, the Administrative Law Judges make the following:

ORDER

IT IS HEREBY ORDERED that

1. Respondent Patricia Bataglia is hereby assessed a civil penalty of \$700.
2. Payment shall be made within 30 days by check payable to the Office of Administrative Hearings.

3. This Order is stayed 30 days to allow time for appeal.

Dated November 10, 2004

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

/s/ John A. Ellefson
JOHN A. ELLEFSON
Administrative Law Judge

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Taped, two tapes, not transcribed.

^[1] Compensation Judge assigned to act as an Administrative Law Judge in this matter by the Chief Administrative Law Judge pursuant to Minn. Stat. §§ 14.48, subd. 3(c), and 14.50.

^[2] Testimony of Respondent; *see, also*, the Minnesota Secretary of State's web site.

^[3] Ex. 1.

^[4] Ex. 15.

^[5] Exs. 6-7.

^[6] Exs. 3-5.

^[7] Ex. 8.

^[8] Testimony of Respondent.

^[9] Ex. 21.

^[10] Ex. 12.

^[11] Exs. 9-11.

^[12] Testimony of Respondent.

^[13] Exs. 9, 13, and 19.

^[14] Ex. 9.

^[15] Testimony of Respondent.

^[16] Ex. 2.

^[17] Minn. Stat. § 211B.01, subd. 2; Minn. Laws 2004, ch. 293, art. 3, § 1.

^[18] Minn. Stat. § 211B.32, subd. 4.